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No. 05-184

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

SALIM AHMED HAMDAN,
Petitioner,

v.

DONALD RUMSFELD, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITES STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONER'S REPLY TO RESPONDENTS' OPPOSITION TO PETITIONER'S MOTION FOR SUPPLEMENTAL BRIEFING

Petitioner Salim Ahmed Hamdan respectfully submits this Reply in support of his Motion for Supplemental Briefing.

The government maintains that the applicability and effect of the Detainee Treatment Act (DTA), Pub. L. No. 109-148, Div. A., Tit. X, 119 Stat. 2739, should be resolved through its subsequently filed Motion to Dismiss. There is a genuine difference between the proposals. The Court's Rules do not provide for a Reply Brief in support of a Motion. There is accordingly no natural vehicle under the government's proposal for it to respond to petitioner's arguments, including petitioner's argument that the DTA is unconstitutional to the extent it purports to strip this Court of jurisdiction over this case. And because those constitutional problems will necessarily inform any interpretation of the statute, see *INS v. St. Cyr*, 533 U.S. 289, 298-300 (2001), briefing will be necessarily incomplete.

The government therefore presumably will be required under its proposal to move for leave to file a Reply Brief. Petitioner, in turn, will be required to move to file a surreply on the constitutional issues, which the government's Motion ignores but which would be addressed in its opening brief under petitioner's supplemental briefing proposal. Otherwise, petitioner would have no opportunity to respond to the government's defense of the statute's constitutionality. In any other context, a dispute over the constitutionality of a federal statute—particularly one that raises grave questions about the unique jurisdiction of this Court—would not be resolved in such a truncated fashion, and the

government offers no reason to adopt such an unusual course here. The more natural mechanism for addressing this question is instead Supplemental Briefs.

The government contends that its proposal is superior because the page limit for petitioner's submission would be 30 pages rather than the proposed 25-page limit of petitioner's Motion. But that misunderstands the Rules again. The Rules do not, in fact, impose any page limit on petitioner's Response to the government's Motion. Petitioner's proposal attempts to identify a reasonable page limitation, and if the Court concluded that 30 pages was more appropriate, it could of course so provide in the Order directing the parties to submit Supplemental Briefing.

The government also contends that its proposal is superior because it will be considered by the Court at its February 17, 2006 conference. But that date has no particular significance, and it is more important that the question be well briefed and thoroughly considered. Given the interrelationship of the jurisdictional issues in the DTA to the merits, the fact that merits briefing will be nearly completed by February 17, and the likelihood that the Court's examination of the merits will provide context for the jurisdictional questions, it seems unlikely that the Court will elect to dismiss the case before argument (cf. No. 04-928, *Oregon* v. *Guzek* (Order of Nov. 23, 2005) (directing that consideration of motion to dismiss be deferred to oral argument)). In any event the Supplemental Briefs on petitioner's schedule would permit that course as well.[1]

* * *

[1] Petitioner notes that these unusual disagreements – over, for example, page limits and the conference at which the briefs will be available for consideration – could have been resolved if the government had responded to petitioners' repeated requests that the parties agree to a mechanism for addressing the applicability and constitutionality of the DTA. That would have been a "common-sense" (Gov't Opp. 2) approach. It declined to do. See Supp. Br. Mo. 1 & n.1; Pet. Br. 1. In a December 22 conversation between petitioner's counsel and the Deputy Solicitor General – subsequently confirmed by an email exchange – petitioner's counsel agreed to await a response from the government on the proper approach to briefing the effect of the DTA. The government now suggests that petitioner, while abiding by that understanding, was instead required to brief the question in petitioner's opening brief. It did not, however, take that position in discussions with petitioner's counsel before the brief was submitted. That would not in any event have been practical: the statute was passed just days before the brief's submission and its passage was in doubt until that point. Indeed, the government now suggests that petitioner submit 30 pages of argument on these intricate jurisdictional questions; had Petitioner followed that proposal in his merits brief it would have left no space to address the questions on which the Court actually granted certiorari.

In any event, petitioner has always maintained that the Detainee Treatment Act does not alter or affect jurisdiction in his case. The government's attempt to chide petitioner for failing to incorporate in his merits brief discussion of a statute that he believes does not apply is misguided, particularly in light of the affirmative steps petitioner took to notify the Court of the issue and resolve it amicably with Respondents.

The Court should accordingly direct the parties to submit Supplemental Briefs on the applicability and constitutionality of the Detainee Treatment Act to this case. In the alternative, it should deny petitioner's motion as moot and direct the Clerk's Office to advise the parties that they will be granted leave to file reply briefs of 10 pages to each others' submissions.

NEAL KATYAL
Counsel for Petitioner

January 18, 2006